IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1371

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN [illegible] COTTER, individually and on behalf of all others similarly situated,

Petitioners,

—against—

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, MAURICE J. O'ROURKE, JAMES M. POWER, THOMAS MALLEE and J. J. DUBERSTEIN, consisting of the BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondents.

STEVEN EISNER, on his own behalf and on behalf of all others similarly situated,

Petitioners,

—against—

NELSON ROCKEFELLER, Governor of The State of New York, JOHN P. LOMENZO, Secretary of State of The State of New York, WILLIAM D. MEISSNER and MARVIN D. CHRISTENFELD, Commissioners of Elections for Nassau County,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND MOTION FOR SUMMARY REVERSAL OR, IN THE ALTERNATIVE, FOR EXPEDITED CONSIDERATION ON THE MERITS

PETITIONERS' REPLY MEMORANDUM

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INDEX

Authorities Cited

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PETITIONERS' REPLY MEMORANDUM

Petitioners respectfully submit, pursuant to Rule 24(4), the within Reply Memorandum in support of their petition for a writ of certiorari and their motion for summary reversal, or, in the alternative, expedited consideration on the merits.

I.

New York asserts that it possesses a compelling state interest in imposing the drastic restrictions at issue herein upon petitioners' initial affiliation with a political party because even previously unaffiliated new voters, such as petitioners, may be organized pursuant to fraudulent "raiding" schemes.

New York's assertion that previously unaffiliated voters, such as petitioners, pose any meaningful threat of "raiding" is patently absurd.[1] Indeed, no other state has imposed restrictions upon previously unaffiliated voters which even approach New York's in severity.

For example, Massachusetts, Illinois, New Jersey and Texas all permit previously unaffiliated voters to declare their initial party affiliation immediately prior to voting in the primary of their choice.[2] California permits pre-

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[1] Moreover, respondents, in asserting that it would be "raiding" for persons to encourage voters to enroll in a political party in order to support a candidate in the party's Presidential Primary, totally misconceive the nature of the primary process. Joining a political party in order to support its prospective nominee for President is not "raiding" and New York State possesses no compelling, or even legitimate, interest in inhibiting such an occurrence.

[2] See, *Annotated Laws of Massachusetts*, ch. 53, §§37, 38; *Illinois Annotated Statutes*, §§5-30; 7-43-45; *New Jersey Statutes Annotated*, 19:23-45; *Vernon's Annotated Texas Statutes*, Title 9, Article 13.01a.

viously unaffiliated voters to declare an initial party affiliation up to 53 days before a primary. *California Election Code,* §§22, 203, 311-312. Pennsylvania permits a previously unaffiliated voter to declare an initial party preference up to 50 days before a primary. *Purdon's Pennsylvania Statutes Annotated,* Title 25, §291 *et seq.* Michigan permits any registered voter to participate in the primary of his choice. *Michigan Compiled Laws Annotated,* §§168.570, 575-576. Even Ohio, renowned for the severity of its election laws,[3] permits previously unaffiliated voters to declare an initial party affiliation immediately before a primary. *Ohio Revised Code,* §3513.19.

Thus, whatever the views of the various states on permitting established members of one party to switch their affiliation from one party to another (Compare, *Pontikes* v. *Kusper,* —— F. Supp. —— (N.D. Ill., March 9, 1972) and *Gordon* v. *Executive Committee of Democratic Party,* 335 F. Supp. 166 (D.S.Car., 1971) with *Lippitt* v. *Cippollone, supra*), no state, with the exception of New York, has deemed it necessary to impose crippling restrictions upon newly registered voters making an initial declaration of party affiliation.[4]

II.

Throughout its brief in opposition herein, New York has consistently misstated the facts and circumstances surrounding petitioners' decision to seek declaratory, as op-

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[3] See, e.g., *Williams* v. *Rhodes,* 393 U.S. 23 (1968); *Lippitt* v. *Cippollone,* —— U.S. ——, 40 U.S.L.W. 3334 (January 17, 1972).

[4] It should, of course, be noted that a new voter's affiliation with a political party in New York, whenever it occurs, must be preceded by his signing a loyalty oath (*Election Law,* §174) and may be policed by a summary expulsion procedure (*Election Law,* §332).

posed to injunctive, relief in the District Court. Those facts and circumstances are accurately recited by Chief Judge Mishler in his Supplemental Opinion Denying Reargument, which is reproduced herein as Petitioners' Supplemental Appendix.[5]

From the inception of the proceedings herein it was petitioners' hope to remove the absolute barrier to party enrollment posed by Section 186 as quickly as possible in order to encourage meaningful registration campaigns prior to New York's June primaries. Accordingly, when Chief Judge Mishler indicated that a decision herein might be expedited were the case to proceed before a single District Judge (Supp. App. 3a), petitioners' counsel were delighted to withdraw their request for injunctive relief, thus rendering a three-judge Court unnecessary (Supp. App. 4a).[6]

Unfortunately, petitioners' hopes to remove the impediment to enrollment posed by Section 186 as quickly as possible in order to encourage registration among newly enfranchised voters were dashed by New York's decision to seek a Second Circuit stay of Chief Judge Mishler's February 10, 1972, opinion pending appeal. The stay,

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[5] Respondents have studiously avoided all reference to Chief Judge Mishler's Supplemental Opinion in their Brief in Opposition.

[6] In all candor, in New York State, in cases of this sort, little practical advantage is gained by seeking injunctive, as opposed to declaratory, relief, since in counsel's combined experience, no New York State election official has ever refused to comply with the declaratory judgment of a Federal Court. Indeed, the identical procedure was followed by counsel herein in *Long Island Vietnam Moratorium Committee* v. *Cahn*, 322 F. Supp. 559 (EDNY), *aff'd* 437 F.2d 344 (2nd Cir. 1970), appeal pending, when it no longer appeared that injunctive, as opposed to declaratory, relief was required.

granted on February 22, 1972, coupled with the panel's subsequent reversal of Chief Judge Mishler on April 7, 1972, resulted in the continued refusal of New York election officials to permit newly enfranchised young voters to qualify to vote in the June Presidential Primary. Such a continued refusal, quite predictably, exerted a highly effective deterrent upon registration.

Thus, the "massive efforts" cited by the State respondents to register newly enfranchised young voters consisted of exhorting them to register, while simultaneously informing them that even if they registered, they would be ineligible to vote in the June Presidential Primary. The predictable reaction to such an exercise in political cynicism has been the "lag in teen vote registration" so bemoaned by the State respondents.

III.

Respondents assert that although Section 186 concededly bars all persons who have established a residence in New York since the last general election in November, 1971 from voting in the June, 1972 primaries, petitioners lack standing to urge the obvious conflict between Section 186 and *Dunn* v. *Blumstein*, —— U.S. ——, 40 U.S.L.W. 4269 (March 21, 1972). However, petitioners, as otherwise qualified voters who are concededly barred from voting in the June, 1972 Presidential Primary solely because of the operation of Section 186, possess unquestioned standing to attack the statutes' deferred enrollment procedures and to raise all arguments demonstrating their unconstitutionality. Once a prospective voter is demonstrably injured by the operation of a statute restrictive of the franchise, he must be permitted to demonstrate that the statute's unconstitutional impact is felt across the entire spectrum of

the electorate, cf. *Thornhill* v. *Alabama*, 310 U.S. 88, 98 (1940); *Flast* v. *Cohen*, 392 U.S. 83 (1968).

Moreover, New York's attempt to prevent the obvious conflict between Section 186 and *Dunn* v. *Blumstein*, *supra*, from being considered by this Court is particularly inappropriate since in *Jordan* v. *Meisser*, —— U.S. ——, 40 U.S.L.W. 3398 (February 22, 1972), New York inadvertently mis-stated the impact of Section 186 and represented to this Court that newly arrived residents of New York would not be inhibited from voting in the June primaries by the operation of Section 186. Acting upon New York's inadvertent misrepresentation, this Court dismissed the *Jordan* appeal. Now, having conceded that Section 186 *does* bar newly arrived residents of New York from voting in the June primary, New York seeks by a hypertechnical application of the standing doctrine to once again insulate its patently unconstitutional statute from judicial review.[7]

IV.

Finally, New York urges that expedited consideration or summary reversal be denied herein.

New York argues that a decision herein prior to the June primaries would have little practical effect because

[7] New York's assertion that the impact of *Dunn* v. *Blumstein*, *supra*, upon Section 186 was not presented to the Courts below in incorrect. The "residence requirement" cases were exhaustively briefed by petitioners in both the Courts below and Chief Judge Mishler explicitly noted that Section 186 acted as an unlawful durational residence requirement (App. 35a-36a). The Second Circuit elected to ignore the residence requirement issue after holding that the Voting Rights Act of 1970 did not apply to primaries (App. 10a). Its inexplicable failure to heed petitioners' requests to measure Section 186 against *Dunn* v. *Blumstein*, *supra*, cannot deprive this Court of its appellate jurisdiction.

as a declaratory judgment action on behalf of four individual voters, it would not be complied with by other election officials across the state. Of course, New York ignores the fact that Chief Judge Mishler explicitly designated the consolidated cases as class actions (App. 12a). However, even if these actions were merely declaratory judgments on behalf of four individuals, the Attorney General's speculation that the decision of this Court would be ignored in New York State is absolutely astonishing. It is plain to *all* counsel involved in this case that should this Court reverse the decision of the Second Circuit and reinstate Chief Judge Mishler's declaratory judgment, the unquestioned result in New York State would be the immediate eligibility of all voters who registered and enrolled for the first time in New York between October 3, 1971 and May 20, 1972 to participate in the June Presidential Primary. Thus, the eligibility of literally tens of thousands of concededly qualified *bona fide* voters to vote in the June primary turns on the grant or denial of expedited relief herein.

Respectfully submitted,

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Supplemental Opinion Denying Reargument

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 71-C-1573

PEDRO J. ROSARIO, *et al.*,

Plaintiffs,

—against—

NELSON ROCKEFELLER, etc., *et al.*,

Defendants.

No. 71-C-1621

STEVEN EISNER, etc.,

Plaintiffs,

—against—

NELSON ROCKEFELLER, etc., *et al.*,

Defendants.

MEMORANDUM OF DECISION AND ORDER

February 17, 1972

The defendants, by order to show cause, move to reargue the decision of this court and the order entered thereon made and dated February 10, 1972 on the grounds of (1) lack of jurisdiction of a single district judge to declare

§186 unconstitutional, and (2) abuse of discretion in granting declaratory judgment.

The court did not overlook the issue now raised. The decision made reference to the withdrawal of the motion for the convening of a three judge district court and noted that plaintiffs had withdrawn their application for that relief. Because of what had transpired, as will be hereinafter described, the court assumed that the parties agreed that a single judge district court would pass on the issue of the unconstitutionality of §186 of the Election Law of the State of New York.

The Rosario complaint prayed for (1) convening a three-judge district court, (2) declaring §186 unconstitutional and (3) granting "plaintiffs appropriate equitable relief to assure their participation in the 1972 primary elections scheduled for June 1972".

On December 6, 1971, the day of the filing of the complaint, an order was signed directing the defendants to show cause why a three-judge district court should not be convened pursuant to 28 U.S.C. §2281. The motion was returnable on December 17, 1971. In the meantime and on December 15th, Eisner filed a complaint praying that the court declare §§117 and 186 of the Election Law of the State of New York unconstitutional and praying for appropriate equitable relief to enforce "plaintiff's right to participate in the New York State Presidential Primary scheduled for June 20, 1972". A motion was made for a three-judge district court returnable on December 17, 1971. Defendants served a notice of motion to dismiss the complaint for lack of jurisdiction and failure to state a claim upon which relief may be granted. [Rules 12(b)(1), 12(b)(6) and 12(c)].

On the return day of all the motions, i.e., December 17, 1971, there was discussion in open court among Seymour Friedman, attorney for plaintiffs Rosario, et al., Burt Neuborne, attorney for plaintiff Eisner, et al., A. Seth Greenwald, an Assistant Attorney General of the State of New York, J. Kemp Hannon, an attorney representing the Nassau County Board of Elections and J. Lee Rankin (by Mr. Gensler), representing The City of New York, concerning the advisability of convening a three-judge district court in the light of the time schedule for appellate review prior to June 20, 1972.

In *Bachrow* v. *Rockefeller*, 71-C-930, a three judge district court on September 8, 1971 dismissed a challenge to §186 for mootness.[1] The same lawyers participated in *Bachrow*. The undersigned was a member of the three judge district court.

Since Christmas vacations were about to commence and a delay in convening a three judge district court was a possibility, all the lawyers agreed that a more expeditious appellate review could be realized if the determination on the constitutionality of §186 were determined by the undersigned as a single district court judge. Thereupon the plaintiffs agreed to withdraw their request for injunctive relief. The Court wrote an order to that effect which stated that the action is "solely one for declaratory judg-

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[1] In its memorandum of decision, the court, noting the difficulty in securing a determination, cited the dissenting opinions in Hall v. Beals, 396 U.S. 45, 90 S.Ct. 20 (1969) in the following language:

"Although the time periods involved may make it difficult to secure a decision and review of any given situation before a specific election takes place (see the dissenting opinions in *Hall* v. *Beals*, *supra*), it does not seem that a diligent plaintiff would find such a task impossible."

ment". Messrs. Friedman, Greenwald and Gersler signed their consent to that order.[2]

Thereafter briefs were served and filed by all the parties. The constitutional points were argued in the briefs. None of the parties argued the question of jurisdiction. The defendants now argue that the stipulation does not "amount to a consent on the part of the defendants above to jurisdiction or the propriety of the granting of a sweeping declaratory judgment by a single judge in a case of this nature." (Defendants' Memorandum of Law, p. 1)

The parties cannot confer jurisdiction on this court. The power of the court to act cannot therefore be based upon the consent of the defendants. Rather, the court has recounted the history of this proceeding as an answer to the defendants in charging an abuse of discretion in deciding this case as a single district court judge. The defendants' claim of an abuse of discretion in granting a declaratory judgment as provided in 28 U.S.C. §2201 is rejected in view of the conduct of the defendants' counsel described herein at length.

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[2] The consent reads as follows:

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12/17/71

On consent of the parties hereto the prayer for relief is amended by eliminating paragraph (3) of the prayer for relief and the action is solely one for declaratory judgment.

So Ordered

s/ Jacob Mishler
U.S.D.J.

Consent

s/ Seymour Friedman

J. Lee Rankin, Corp. Counsel
s/ by Att Gersler

Louis J. Lefkowitz by
s/ A. Seth Greenwald

The power of a single-judge district court to determine constitutional questions is stated in *Rosado* v. *Wyman*, 397 U.S. 397, 402; 90 S.Ct. 1207, 1212-13, as follows:

> "Jurisdiction over federal claims, constitutional or otherwise, is vested exclusively or concurrently, in the federal district courts. Such courts usually sit as single-judge tribunals."

The district court is a court of limited jurisdiction. Jurisdiction to decide questions involving the deprivation of civil rights granted under the Constitution is found in 28 U.S.C. §1343.[1]

The power to decide constitutional questions in the first instance is in the federal district court. Congress has seen fit to limit that power by denying a single judge the right to issue "an interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . ." (28 U.S.C. §2281).

The defendants would extend that limitation to an action for declaratory judgment where the effect of that judgment would be identical to that of an injunction. *Rosado* v. *Wyman*, 304 F.Supp. 1350, 1352 (E.D.N.Y. 1969), [Weinstein, D.J.].

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[1] The pertinent portion of 28 U.S.C. §1343 recites:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. June 25, 1948, c. 646, 62 Stat. 932."

Chief Judge Lumbard's concurring opinion in *Rosado* v. *Wyman*, 414 F.2d 170, 184 (2d. Cir. 1970), made the following observation with reference to the same issue:

> "That the state statute could be held unconstitutional in a declaratory ruling by the single judge seems settled. See ALI Study of the Division of Jurisdiction Between State and Federal Courts 245 (Tent. Draft No. 6, 1968), recommending that such a declaratory judgment requires a three-judge court but noting: [T]he requirement is here extended to cases seeking only a declaratory judgment, a remedy which was unknown in 1910. Three judges are not now needed in such a case. Cf. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 154-55, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963); *Flemming* v. *Nestor*, 363 U.S. 603, 606-607, 80 S.Ct. 1367, 4 L.Ed. 2d 1435 (1960).

Kennedy v. *Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554 (1963) defined the power of a single district court judge to declare a federal statute unconstitutional.[4] In *Mendoza-Martinez*, the plaintiff brought an action in the district court seeking to have §401(j) of the Nationality Act of 1940 declared unconstitutional. That act deprived a citizen, who remained out of the country for the purpose of avoiding the draft, of his citizenship. The Court said:

> "The present action, which in form was for declaratory relief and which in its agreed substance did not contemplate injunctive relief, involves none of the dangers to which Congress was addressing itself. The

[4] 28 U.S.C. §2282 places the same limitation on the power of a single district court judge with reference to the enforcement, operation or execution of any Act of Congress as 28 U.S.C. §2281 places on the power with relation to any state statute.

relief sought and the order entered affected an Act of Congress in a totally non-coercive fashion. There was no interdiction of the operation at large of the statute. It was declared unconstitutional, but without even an injunctive sanction against the application of the statute by the Government to Mendoza-Martinez. Pending review in the Court of Appeals and in this Court, the Government has been free to continue to apply the statute. That being the case, there is here no conflict with the purpose of Congress to provide for the convocation of a three-judge court whenever the operation of a statutory scheme may be immediately disrupted before a final judicial determination of the validity of the trial court's order can be obtained. Thus there was no reason whatever in this case to invoke the special and extraordinary procedure of a three-judge court." 372 U.S. at 155, 83 S.Ct. at 560-61.[5]

Were the court to accept the defendants' argument, then the result would be that no single judge district court would have the power to entertain an action for a judgment declaring any statute unconstitutional. The restraining effect of a declaratory judgment which defendants describe would be present in every case to a greater or lesser de-

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[5] The Circuits have generally understood *Mendoza-Martinez* to approve the power of a single district judge to declare statutes unconstitutional. *See, Merced Rosa* v. *Herrero*, 423 F.2d 591 (1st Cir. 1970); *United States* v. *Southern Ry. Co.*, 380 F.2d 49 (4th Cir. 1967); *Wilson* v. *Gooding*, 431 F.2d 855 (5th Cir. 1970); *Briscoe* v. *Kusper*, 435 F.2d 1046 (7th Cir. 1970); *Sellers* v. *Regents of the University of California*, 432 F.2d 493 (9th Cir. 1970); *But See Jeannette Rankin Brigade* v. *Chief of the Capitol Police*, 421 F.2d 1090 (D.C. Cir. 1969) [Bazelon, C.J., dissenting]. *See* criticism of *Mendoza-Martinez* in *Currie, The Three-Judge District Court in Constitutional Litigation*, 32 U. Chicago L. Rev. 1 (1964).

gree, since statutes are of a wide, general application and must necessarily have an effect beyond the parties to the litigation.

The Congress may further limit the power of a single district judge by denying them the right to declare state or federal statutes unconstitutional. It has not seen fit to do so.

This court has the power to declare §186 unconstitutional and finds it appropriate to exercise such power in this case.

The motion to re-argue is in all respects denied, and it is

So ORDERED.

JACOB MISHLER
U.S.D.J.